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SEETHA VIJAYARATNAM

v.

VICKNESH VISVALINGAM

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COURT OF APPEAL, PUTRAJAYA
SULONG MATJERAIE JCA
HISHAMUDIN MOHD YUNUS JCA
ABDUL WAHAB PATAIL JCA
[CIVIL APPEAL NO: N-02(IM)-2071-2011]

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31 MAY 2013

FAMILY LAW: *Financial obligation - Maintenance - Application for variation of order - Whether there was misrepresentation of facts at maintenance proceedings - Whether delay in application fatal - Whether*

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lack of explanation rendered application not bona fide - Law Reform (Marriage and Divorce) Act 1976, s. 83 - Married Woman and Children (Maintenance) Act 1950, s. 3

FAMILY LAW: *Financial obligation - Maintenance - Maintenance order granted by Magistrate's Court - Application for variation of order - Law Reform (Marriage and Divorce) Act 1976, s. 83 - Whether there was misrepresentation of facts on wife's part when making application maintenance - Reduction in maintenance payment allowed by High Court - Appeal against decision - Whether application under s. 83 an abuse of process of court - Whether allows party to seek review of decision that had already been made - Whether appellate intervention warranted - Married Woman and Children (Maintenance) Act 1950, s. 3*

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The respondent/husband and the appellant/wife had been living apart due to the breakdown of their marriage since November 2007. In August 2008, the Magistrate's Court allowed the appellant's application under s. 3 of the Married Woman and Children (Maintenance) Act 1950 ('Married Woman and Children (Maintenance) Act') for maintenance. However, upon appeal by the respondent against the maintenance order, the High Court reduced the monthly maintenance payment and ordered the respondent to pay arrears of maintenance payments to the appellant ('order of 30 January 2009'). Some six months later, the respondent filed a divorce petition against the appellant seeking for a dissolution of the marriage and filed an application pursuant to s. 83 of the Law Reform (Marriage and Divorce) Act 1976 ('1976 Act') for a variation of the order of 30 January 2009. The respondent alleged that there had been a misrepresentation of

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facts on the part of the appellant when making the application for maintenance before the Magistrate's Court. The appellant raised an objection that the application under s. 83 of the 1976 Act was an abuse of process as it sought to set aside or reduce an order of maintenance made under s. 3 of the Married Woman and Children (Maintenance) Act which has its own provisions for variations and that to allow the application would amount to allowing a party to reopen or to seek a review of a decision that had already been made under the Married Woman and Children (Maintenance) Act. The learned High Court Judge made a finding of fact that there were misrepresentations by the appellant and allowed the respondent's application to vary the order of 30 January 2009. Hence, this appeal by the appellant.

Held (dismissing appeal with costs)
Per Abdul Wahab Patail JCA (majority):

(1) The learned judge took into consideration the fact that there was a divorce petition which remained pending even at the hearing of this appeal, and thus, s. 83 of the 1976 Act would apply. The subject matter and its circumstances must be taken into consideration in order to decide whether a law ought to be read restrictively or liberally. An application for maintenance is made by the one who is entitled to and needs financial support in the form of maintenance whereas, an application for variation of maintenance order is made by one whose circumstances have changed or there has been a misrepresentation of fact. (paras 10, 11 & 12)

(2) A strict application of the law imposes upon such persons unnecessary technicalities that only provide fodder whilst making no contribution to the merits of such application. In such cases, a more liberal application is to be preferred to facilitate justice rather than handicap it. This was particularly so when the reference to order for maintenance in s. 83 of the 1976 Act is not restricted by the Act to orders of maintenance made solely under it. In the instant case, there was meticulous consideration of the income and expenditures of the parties and a full judicial appreciation of the facts. Hence, there was no error causing injustice that would demand appellate intervention. (paras 12-14)

Per Hishamudin Mohd Yunus JCA (dissenting):

(1) Under s. 83 of the 1976 Act, the learned High Court Judge legally had the power to vary the previous maintenance orders of the Magistrate's Court and that of the High Court although the orders were made under a different legislation, namely, the Married Women and Children (Maintenance) Act. However, in the circumstances of the present case, the exercise of the power was improper as the order of the High Court was vague. It should have been more specific, in that, it must state in what manner the order of 30 January 2009 was to be varied. (paras 45-48)

(2) If the respondent was dissatisfied with the decision of the High Court of 30 January 2009, the proper course of action open to him was to appeal to the Court of Appeal and not to file an application pursuant to s. 83 of the 1976 Act. Moreover, the issues that he raised were nothing new as it had already been raised by the parties and ventilated before the Magistrate's Court in the maintenance proceedings. There could not now be a reopening of the same issues by the respondent by invoking s. 83 of the 1976 Act as it would be an abuse of the process of the court. In the circumstances, the application to vary the order of 30 January 2009 was against the principle of *res judicata*. (para 49)

(3) If the respondent had taken the position that there was in fact a misrepresentation of facts made by the appellant at the maintenance proceedings before the Magistrate's Court, any application to vary the order must be made as soon as possible under s. 6 of the Married Women and Children (Maintenance) Act. There was also no explanation proffered by the respondent as to why his application to vary by reason of misrepresentation could not have been made earlier. Hence, a fair inference that could be made was that the long and unexplained delayed application, purportedly made pursuant to s. 83 of the 1976 Act, was not *bona fide*. (para 50)

Bahasa Malaysia *Translation Of Headnotes*

Responden/suami dan perayu/isteri tinggal berasingan disebabkan oleh keretakan rumahtangga mereka semenjak November 2007. Pada Ogos 2008, Mahkamah Majistret membenarkan permohonan perayu di bawah s. 3 Akta Perempuan Bersuami dan Anak-Anak

(Nafkah) 1950 ('Akta Perempuan Bersuami dan Anak-Anak (Nafkah)') bagi nafkah. Walau bagaimanapun, atas rayuan oleh responden terhadap perintah nafkah tersebut, Mahkamah Tinggi telah mengurangkan bayaran nafkah bulanan dan memerintahkan responden membayar tunggakan bayaran nafkah kepada perayu ('perintah 30 Januari 2009'). Selepas kira-kira enam bulan, responden memfailkan petisyen perceraian terhadap perayu memohon untuk pembubaran perkahwinan dan memfailkan permohonan menurut s. 83 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 1976') bagi mengubah perintah 30 Januari 2009. Responden mendakwa bahawa terdapat salah nyata fakta oleh pihak perayu apabila membuat permohonan untuk nafkah di Mahkamah Majistret. Perayu membangkitkan bantahan bahawa permohonan di bawah s. 83 Akta 1976 adalah penyalahgunaan proses kerana ia digunakan untuk mengenepikan atau mengurangkan perintah nafkah yang dibuat di bawah s. 3 Akta Perempuan Bersuami dan Anak-Anak (Nafkah). Yang arif Hakim Mahkamah Tinggi membuat dapatan fakta bahawa terdapat salah nyata oleh perayu dan membenarkan permohonan responden untuk mengubah perintah 30 Januari 2009. Maka, rayuan ini oleh perayu.

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Wahab Patail HMR (majoriti):

(1) Yang arif hakim telah mempertimbangkan fakta bahawa terdapat petisyen perceraian yang masih menunggu bicara pada masa perbicaraan rayuan ini, dan dengan itu, s. 83 Akta 1976 adalah terpakai. Subjek perkara dan hal keadaannya mesti dipertimbangkan untuk menentukan sama ada undang-undang perlu dibaca secara terbatas atau liberal. Suatu permohonan untuk nafkah dibuat oleh seseorang yang berhak ke atasnya dan memerlukan sokongan kewangan dalam bentuk nafkah manakala, permohonan untuk mengubah perintah nafkah dibuat oleh seseorang yang hal keadaannya telah berubah atau terdapat salah nyata fakta.

(2) Pemakaian undang-undang secara ketat memberikan masalah teknikal kepada pihak-pihak yang hanya menghalang dan tidak membantu dalam merit permohonan. Dalam kes-kes sedemikan, pemakaian liberal diutamakan untuk memudahkan keadilan daripada mencacatkannya. Ini adalah khususnya apabila rujukan kepada perintah untuk nafkah dalam s. 83 Akta 1976 tidak dihadkan oleh Akta kepada perintah untuk nafkah yang

dibuat semata-mata di bawahnya. Dalam kes ini, pertimbangan secara teliti terhadap pendapatan dan perbelanjaan pihak-pihak dan penilaian kehakiman fakta-fakta telah dilakukan dengan sepenuhnya. Dengan itu, tiada kekhilafan berlaku yang mengakibatkan ketidakadilan yang memerlukan campur tangan rayuan.

Oleh Hishamudin Mohd Yunus HMR (menentang):

(1) Di bawah s. 83 Akta 1976, yang arif Hakim Mahkamah Tinggi mempunyai kuasa di sisi undang-undang untuk mengubah perintah nafkah terdahulu oleh Mahkamah Majistret dan Mahkamah Tinggi walaupun perintah tersebut dibuat di bawah perundangan yang berbeza, iaitu, Akta Perempuan Bersuami dan Anak-Anak (Nafkah). Walau bagaimanapun, dalam keadaan kes ini, pelaksanaan kuasa tersebut adalah tidak wajar kerana perintah Mahkamah Tinggi tidak jelas. Ia sepatutnya adalah lebih spesifik, di mana, ia sepatutnya menyatakan bagaimana perintah 30 Januari 2009 harus diubah.

(2) Jika responden tidak berpuas hati dengan keputusan Mahkamah Tinggi bertarikh 30 Januari 2009, tindakan wajar yang terbuka kepadanya adalah untuk merayu ke Mahkamah Rayuan dan bukannya untuk memfailkan permohonan di bawah Akta 1976, s. 83. Tambahan lagi, isu-isu yang dibangkitkannya bukanlah sesuatu yang baharu dan ia telah dibangkitkan oleh pihak-pihak dan diputuskan di Mahkamah Majistret semasa prosiding nafkah. Isu-isu yang sama tidak boleh dibuka semula oleh responden dengan membangkitkan s. 83 Akta 1976 kerana ia akan menjadi penyalahgunaan proses mahkamah. Dalam keadaan tersebut, permohonan untuk mengubah perintah 30 Januari 2009 adalah bertentangan dengan prinsip *res judicata*.

(3) Jika responden telah mengambil kedudukan bahawa sememangnya terdapat salah nyata fakta oleh perayu dalam prosiding nafkah di Mahkamah Majistret, sebarang permohonan untuk mengubah perintah tersebut mesti dibuat secepat mungkin di bawah s. 6 Akta Perempuan Bersuami dan Anak-Anak (Nafkah). Malah, tidak ada penjelasan yang diberikan oleh responden tentang mengapa permohonannya untuk mengubah atas alasan salah nyata tidak boleh dibuat lebih awal. Maka, anggapan adil yang boleh dibuat adalah bahawa permohonan yang lambat dan tidak beralasan yang dikatakan dibuat di bawah s. 83 Akta 1976 adalah tidak *bona fide*.

Case(s) referred to:

Gisela Gertrud Abe v. Tan Wee Kiat [1986] 2 CLJ 202; [1986] CLJ (Rep) 133 SC ***(refd)***

Ngu Chu Chiong @ Ngu Choo Chiong v. Lina Soo [2008] 1 LNS 9 CA ***(refd)***

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, s. 83

Married Woman and Children (Maintenance) Act 1950, ss. 3, 6

For the appellant - Azlan Mashod (T Gunaseelan with him); M/s Gunaseelan & Assocs

For the respondent - Rubini Thirugnanam (Ashok Kandiah with her); M/s Kandiah Partnership

[Appeal from High Court, Seremban; Divorce Petition No: 33-244-2009]

Reported by S Barathi

JUDGMENT

Abdul Wahab Patail JCA:

[1] It was recorded at the beginning of the hearing that the parties have agreed that the decision in this appeal will bind the motion fixed for hearing on 2 March 2012 and the applicant therein undertakes to file a notice of discontinuance

[2] We note a sealed order had not been extracted. However, adopting the view that since the unsealed order had been signed by the respondent/petitioner/husband Vicknesh a/l Visvalingam ("the husband") and its terms not disputed, it was deemed to have been approved after 24 hours, and the appeal could proceed to be heard.

[3] The appellant herein and respondent in the High Court is the then wife ("the wife").

[4] The husband had applied before the High Court for orders as follows:

(a) Membatalkan perintah bertarikh 30.1.2009 yang dibuat oleh Mahkamah Tinggi Malaya di Seremban di bawah Rayuan Sivil No. 11-14-2008;

(b) Secara alternative Perintah bertarikh 30.1.2009 oleh Mahkamah Tinggi Malaya di Seremban di bawah Rayuan Sivil No. 11-14-2008 diubah setakat mana bahawa pembayaran

A nafkah kepada Responden dikurangkan kepada suatu jumlah yang dianggap adil dan berpatutan oleh Mahkamah Yang Mulia ini;

(c) Bahawa Perintah bertarikh 30.1.2009 oleh Mahkamah Tinggi Malaya di Seremban di bawah Rayuan Sivil No. 11-14-2008 B tersebut digantungkan sementara menunggu pelupusan permohonan ini;

(d) Bahawa kos permohonan ini adalah kos dalam kausa; dan

(e) Relif-relif dan/atau perintah-perintah lain yang Mahkamah C Yang Mulia ini anggap sesuai dan adil dalam keadaan.

[5] Rayuan Sivil No. 11-14-2008 in the High Court was an appeal from the decision of the Magistrate's Court, Seremban on 21 August 2008 where the wife had applied under s. 3 of the D Married Woman and Children (Maintenance) Act 1950 for maintenance.

[6] The High Court on 30 January 2009 made the following orders in Rayuan Sivil No. 11-14-2008:

E (a) Bahawa Pempetisyen membayar Responden nafkah sebanyak RM2,000.00 sebulan berkuatkuasa dari bulan Mac 2009; dan

(b) Tunggakan nafkah RM25,000.00 hendaklah dibayar dalam lima (5) ansuran iaitu RM5,000.00 setiap bulan bermula dari 15.2.2009. F

[7] Meantime on 13 January 2009, the husband filed a divorce petition. In that petition he had also applied under s. 83 of the Law Reform (Marriage and Divorce) Act 1976 to set aside or at least reduce the order of maintenance made by the High Court in G Rayuan Sivil No. 11-14-2008. That petition was struck out and with it his application to set aside or reduce the order of maintenance made under s. 3 of the Married Woman and Children (Maintenance) Act 1950.

H **[8]** On 27 July 2009, the husband applied again for the same orders under s. 83 of the Law Reform (Marriage and Divorce) Act 1976. At the end of the hearing, the High Court made the order set out in para. 4 above, having found as follows:

I 31. Berdasarkan fakta dan bukti yang dikemukakan oleh Pempetisyen, saya merumuskan bahawa terdapat unsur-unsur salah nyata pendapatan dan perbelanjaan Responden yang

mewajarkan perintah bertarikh 30.1.2009 diubah. Justeru membenarkan permohonan Pempetisyen di Lampiran 4 dengan kos RM1,000.00.

[9] The objection was made before the High Court that the application under s. 83 of the Law Reform (Marriage and Divorce) Act 1976 was an abuse of process as it sought to set aside or reduce an order of maintenance made under s. 3 of the Married Woman and Children (Maintenance) Act 1950 which has its own provisions for variations. Further, to allow the application in this case would amount to allowing a party to reopen or to seek a review of a decision that has already been made under the Married Woman and Children (Maintenance) Act 1950.

[10] The grounds of judgment of the High Court show that the issue was considered. Although the two cases referred to by the learned judge, *Ngu Chu Chiong @ Ngu Choo Chiong v. Lina Soo* [2008] 1 LNS 9; [2008] 3 MLJ 42 and *Gisela Gertrud Abe v. Tan Wee Kiat* [1986] 2 CLJ 202; [1986] CLJ (Rep) 133, do not have a similar fact matrix of an application under s. 83 to vary a maintenance order under another legislation, para. 21 of the grounds of judgment shows that the learned judge took into consideration the fact there was Divorce Petition No. 33-244-2009 which remains pending even at the hearing of this appeal.

[11] Since there was a petition for divorce, s. 83 of the Law Reform (Marriage and Divorce) Act 1976, which provides that the court may at any time and from time to time vary or rescind, any subsisting order for maintenance .... where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances would apply.

[12] In our view, whether a law ought to be read restrictively or liberally must take into consideration the subject matter and its circumstances. An application for maintenance is made by one who is entitled to and needs financial support in the form of maintenance. An application for variation of a maintenance order is made by one whose circumstances have changed or there has been a misrepresentation of fact. Such applications are made by spouses. They are individuals, persons and not businesses. A strict application of the law, that since the maintenance order had been obtained under the Married Woman and Children (Maintenance) Act 1950, a setting aside or variation can only be made under the same Act, and not under the Law Reform (Marriage and Divorce)

A Act 1976 even though there is a divorce petition pending, exposes such persons, imposes upon such persons unnecessary technicalities that only provide fodder for the lawyers whilst making no contribution to the merits of such application. In such cases, a more liberal application is to be preferred, to facilitate justice rather
B than handicap it. This is particularly so when the reference to order for maintenance in s. 83 is not restricted by the Act to orders of maintenance made solely under it.

[13] Paragraphs 23 to 30 show a meticulous consideration of the
C income and expenditures of the parties and a full judicial appreciation of those facts.

[14] In the circumstances, we found no error causing such injustice as would demand appellate intervention. Accordingly, we dismissed the appeal with costs.
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Hishamudin Mohd Yunus JCA:

Introduction

[15] This is an appeal against the decision of the learned High
E Court Judge of Seremban given on 28 June 2011.

[16] The learned High Court Judge of Seremban, by his order of 28 June 2011, had, after hearing a notice of application under s. 83 of the Law Reform (Marriage and Divorce) Act 1976 ('the
F Law Reform Marriage and Divorce Act'), varied an earlier order that was made by Azhar Maah J (as he then was) on 30 January 2009.

The Background Facts

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[17] The appellant and respondent were married on 24 January 1999. Due to differences between the couple, the marriage broke down. They had been living apart since November 2007.

[18] They have no children.
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[19] On 4 June 2008, the appellant/wife commenced an action against the respondent/husband under s. 3 of the Married Women and Children (Maintenance) Act 1950 ('the Married Women and Children Maintenance Act') at the Seremban Magistrate's Court
I for maintenance.

[20] Section 3 of the Married Women and Children Maintenance Act provides:

> **3. Court may make an order for maintenance of wife and children**
>
> (1) If any person neglects or refuses to maintain his wife or a legitimate child of his which is unable to maintain itself, a court, upon the proof thereof, may order such person to make a monthly allowance for the maintenance of his wife or such child, in proportion to the means of such person, as the court seems reasonable.

[21] The respondent/husband opposed the application. The parties filed their respective affidavits.

[22] The appellant/wife is an executive officer with RHB Bank, at the Bangi branch, earning a monthly salary of RM5000. In her affidavits at the maintenance proceeding before the Magistrate's Court she stated that her monthly take home pay was only RM1,748.25. She claimed that her total monthly expenses to be RM6,356 (in her affidavits she listed 16 items of living expenses). She also claimed that after the marriage the respondent/husband had been maintaining her until 1 January 2007. She alleged that the respondent/husband left the matrimonial home on 3 November 2007.

[23] The respondent/husband is a Gynaecological Oncologist at the Kuala Lumpur Hospital with a monthly salary of RM9,764.30. He also did part-time work (locum) at the Nilai Cancer Hospital and earned about RM2,700 per month. In his affidavit at the maintenance proceeding before the Magistrate's Court, he denied ever maintaining the appellant/wife since marriage.

[24] After hearing the application, the learned Magistrate made a maintenance order on 21 August 2008. The learned Magistrate ordered the respondent/husband to pay maintenance to the appellant/wife in the sum of RM3,700 per month, with effect from the date of the order. The learned Magistrate also ordered the respondent/husband to pay the appellant/wife arrears of maintenance payments of RM3,700 per month with effect from 1 January 2007 up to the date of the order.

[25] Now, under s. 6 of the Married Women and Children Maintenance Act there is a provision that states:

> **6. Rescission and variation order**
>
> (1) On the application of any person receiving or ordered to pay a monthly allowance under this Act, and on proof of a change of circumstances, his wife or child, or for other good cause being shown to the satisfaction of the court, the court by which such order was made, may rescind the order or may vary it as it seems reasonable.

[26] After the issuance of the order for maintenance by the Magistrate's Court on 21 August 2008, there was no complaint by the respondent/husband to the effect that there had been a material misrepresentation of fact by the appellant/wife when she made the application for the maintenance before the Magistrate's Court. There was no application made to the Magistrate's Court pursuant to this s. 6 by the respondent/husband for a rescission of the maintenance order or for variation of the same by reason of misrepresentation.

[27] Instead, what the respondent/husband did was that he appealed against the maintenance order made by the Magistrate's Court.

[28] The appeal was heard at the Seremban High Court before Azhar Maah J (as he then was). On 30 January 2009, the then learned High Court Judge, after hearing the appeal, reduced the monthly maintenance payment from RM3,700 per month to RM2,000 per month. However, the learned judge also ordered the respondent/husband to pay to the appellant/wife arrears of maintenance payments in the sum of RM25,000 on an instalment basis of RM5,000 per month.

[29] The respondent/husband did not appeal to the Court of Appeal against that decision.

[30] Some six months later, on 27 July 2009, the respondent/husband filed a divorce petition against the appellant/wife seeking for a dissolution of the marriage.

[31] On the same day, the respondent/husband filed an application pursuant to s. 83 of the Law Reform (Marriage and Divorce) Act seeking for a variation of the High Court order of 30 January 2009 alleging that there had been a misrepresentation

of facts on the part of the appellant/wife when making the application for maintenance before the Magistrate's Court on 4 June 2008.

[32] The respondent/husband alleged that there was misrepresentation on the part of the appellant's wife when she stated in her affidavits before the Magistrate's Court:

(a) that her monthly take home pay was only RM1,748.25; and

(b) that the respondent/husband maintained appellant/wife throughout the period when they were living together.

[33] Now, s. 83 of the Law Reform (Marriage and Divorce) Act provides:

> **83. Power of court to vary orders for maintenance**
>
> The court may at any time and from time to time vary, or rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in circumstances.

[34] The learned Judge of the High Court of Seremban on 28 June 2011 ruled that he had the power to vary the maintenance order pursuant to s. 83 of the Law Reform (Marriage and Divorce) Act notwithstanding the fact that the maintenance orders made by the Magistrate's Court and by Azhar Maah J were made under the Married Women and Children Maintenance Act.

[35] The learned High Court Judge also made a finding of fact that there were misrepresentations made by the appellant/wife at the maintenance proceeding before the Magistrate's Court. However, the learned judge did not explain what the misrepresentations were.

[36] Accordingly the learned High Court Judge allowed the respondent's/husband's application made pursuant to s. 83 of the Law Reform (Marriage and Divorce) Act, and he varied the order of the High Court (made by Azhar Maah J) that was made on 30 January 2009. However, the order made by the learned High Court Judge is rather peculiar in that in the purported 'varying' of

the order of 30 January 2009, the order of 28 June 2011 does not state in what manner the previous order is to be varied. All that the order states:

> MAKA ADALAH DIPERINTAHKAN bahawa menurut Seksyen 83 Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 bahawa Perintah bertarikh 30.1.2009 oleh Mahkamah Tinggi Malaya di Seremban di bawah Rayuan Sivil No. 11-14-2008 diubahkan setakat mana pembayaran nafkah kepada Responden dikurangkan kepada suatu jumlah yang dianggap adil dan berpatutan oleh Mahkamah yang Mulia ini;

[37] The appellant/wife aggrieved by the above order appeal to the Court of Appeal.

Appellant's Argument

[38] The position taken by the appellant/wife is that after the decision of the High Court of 30 January 2009 (the decision of Azhar Maah J), the respondent/husband should have appealed to the Court of Appeal, if he was dissatisfied with that decision. And since he had not appealed to the Court of Appeal, the matter is now *res judicata*.

[39] The appellant/wife further argues that the High Court has no power to vary the earlier order of the High Court pursuant to s. 83 of the Law Reform (Marriage and Divorce) Act, since the Magistrate's Court order (as well as the order of Azhar Maah J) was made pursuant to a different legislation, namely, s. 3 of the Married Women and Children Maintenance Act. Any application to vary that earlier order by reason of (alleged) misrepresentation must be made under s. 6 of the Married Women and Children Maintenance Act.

[40] The appellant/wife also submits that in any event there is no new evidence adduced by the respondent/husband to show that there had been a misrepresentation of facts by the appellant/wife at the maintenance proceeding before the Magistrate's Court, and that the issues now raised by the respondent/husband in his s. 83 application are not new issues but are issues that had already been ventilated before the Magistrate's Court during the maintenance proceeding.

Decision Of This Court

[41] By a majority decision, this court dismissed the appellant's/wife's appeal with cost.

[42] I dissented.

[43] I am allowing the appeal with costs.

Reasons For My Dissenting Judgment

[44] The following are my reasons.

[45] At the outset I wish to state here that I accept the contention by the respondent/husband that under s. 83 of the Law Reform (Marriage and Divorce) Act the learned High Court Judge legally had the power to vary the previous maintenance orders of the Magistrate's Court and that of Azhar Maah J although those orders were made under a different legislation, namely, the Married Women and Children Maintenance Act. I so hold by reason of the words 'any subsisting order for maintenance' appearing in s. 83. In my judgment, it is reasonable to interpret these words to include any maintenance order made under the Married Women and Children Maintenance Act that was subsisting at the time the application under s. 83 was made.

[46] Be that as it may, in my judgment, in the circumstances of the present case, the exercise of that power is improper.

[47] Firstly, as I have just pointed out above, the order of the High Court of 28 June 2011 is vague. The order of the High Court cannot merely states:

> diubahkan setakat mana pembayaran nafkah kepada Responden dikurangkan kepada suatu jumlah yang dianggap adil dan berpatutan oleh Mahkamah yang Mulia ini;

[48] The order of the High Court should have been specific. it must state in what manner the previous order (of 30 January 2009) is to be varied. In other words, the matter should not have been left hanging. On this ground alone it is sufficient for me to allow the appeal.

[49] Further, in my judgment, if the respondent/husband is dissatisfied with the decision of the High Court of 30 January 2009, the proper course of action opened to him is to appeal to the Court of Appeal and not to file an application pursuant to s. 83 of the Law Reform (Marriage and Divorce) Act. This is

because I notice from the respondent's/husband's affidavit in support of his s. 83 application, the issues that he raises are nothing new: they had already been raised by the parties and ventilated before the Magistrate's Court in the maintenance proceeding. There cannot now be a reopening of the same issues by the respondent/husband by invoking s. 83 of the Law Reform (Marriage and Divorce) Act. That would be an abuse of the process of the court. I accept the argument of learned counsel for the appellant/wife that what the respondent/husband is doing, in making the application to vary the High Court order of 30 January 2009, purportedly by invoking s. 83 of the Law Reform (Marriage and Divorce) Act, is against the principle of *res judicata*.

[50] I should also add that if the respondent/husband takes the position that there was in fact a misrepresentation of facts made by the appellant/wife at the maintenance proceeding before the Magistrate's Court, then, since the Magistrate's Court order was made pursuant to s. 3 of the Married Women and Children Maintenance Act, any application to vary that order by reason of misrepresentation, must be made as soon as possible under s. 6 of the same Act. The respondent/husband should not have waited for several months to pass, should not have waited until he filed his divorce petition, and only then to invoke s. 83 of the Law Reform (Marriage and Divorce) Act. Indeed, it is significant to note that there is nothing in the respondent's/husband's supporting affidavit (under the application for ancillary relief pursuant to the divorce petition) to show that the application now made pursuant to s. 83 was motivated by recent discovery of new evidence that was not available earlier despite reasonable diligence. In fact, the respondent/husband, in making his application purportedly under s. 83, is essentially still relying on the same documentary evidence that parties relied upon at the Magistrate's Court. And there is no explanation proffered by the respondent/husband as to why his application to vary by reason of misrepresentation could not have been made earlier pursuant to s. 6 of the Married Women and Children Maintenance Act. In my view, a fair inference that can be made here is that this long and unexplained delayed application, purportedly made pursuant to s. 83 of the Law Reform (Marriage and Divorce) Act, is not *bona fide*.